IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.37 AND 38 OF 2006.

Shri. Vinay Parulekar,
Padhye Building,
1st Floor, Opp Maruti Mandir, ... Appellant/
Dadar,Mumbai-400 028 (Original Complainant)

Versus

Shri. Pramod Meshram,
Sole Proprietor of Invitation
Travel, 50, Parekh Mahal,
1st Floor, 217, L.J.Road, ... Respondent
Dadar, (West) Mumabi-400 016 (Original Accused)

Mr. S. D. Lotlikar, Senior Advocate with Mr. Ryan Menezes and Ms. Sapna Mordekar, Advocates for the appellant.

Mr. S. Chandrashekar, with Mr. S.G. Bhobe Advocates for the respondent.

CORAM : D. B. BHOSALE, J.
DATE : 6th December, 2007.

ORAL JUDGMENT :

1. These two appeals, preferred by Vinayak Parulekar, the complainant, are directed against the two judgment and orders of acquittal of the respondent – accused rendered in two criminal cases bearing No.138/OA/1997/D and 130/OA/1997/D. Both these cases were filed by the complainant U/s.138 of Negotiable Instruments Act (for short 'the Act').

2. Criminal Appeal No.37/2006 is directed against the judgment and order dated 16.12.2005 passed by the learned

Magistrate in Criminal case No.138/OA/1997/D (for short 'the first case') and Criminal Appeal No.38/2006 is directed against the judgment and order dated 16.12.2005 passed by the learned Magistrate in Criminal case No.130/OA/1997/OA (for short 'the second case'). By the impugned judgments the trial Court has acquitted the accused of the offence punishable U/s.138 of the Negotiable Instruments Act, (for short 'the Act')

3. Though the cheques and the evidence led by the parties in these two cases are separate, the parties and the facts so also the circumstances against which the cheques of Rs.3 Lacs and Rs.5 Lacs were issued, are similar and hence, these two appeals are being disposed of by this common judgment. The case set up by the complainant is that the accused had issued these two cheques, dated 28.2.1997 and 11.1.1997, in due course of business towards the debt due and payable to him. Both these cheques were presented by the complainant in his Bank. Both the cheques were bounced and were returned with an endorsement 'not arranged for' and 'payments stopped by the drawer', on 25.4.97 and 9.4.97 respectively. Accordingly, legal notices were issued by the complainant on 27.4.97 and 17.4.97 calling upon the accused to pay the amount of the cheques within a period of 15 days from the date of receipt of the notice. Notices were received by the

accused on 13.5.97 and 23.4.97 respectively. The accused did not make the payment of the cheques amount and, therefore, the complainant filed the two private complaints U/s.138 of the Act. There is no dispute that the presumption contemplated under Section 139 has been raised and, therefore, I am not entering into further factual details. The dispute is only whether the accused has rebutted the presumption and the onus stood shifted on the complainant to establish that the cheques were issued for consideration.

4. According to the complainant, he had given a loan of Rs.3 Lacs and Rs.5 Lacs in cash, to the accused and the accused in turn had issued the cheques in order to repay the loan. The complainant, as stated by him in his deposition, had paid this amount to the accused for purchasing a small premises in Mumbai for the office of Invitation Travels. As against this, according to the accused, the complainant had obtained five different cheques from him under the pretext that he would arrange some loan for Invitation Travels through his contacts from Banks and Financial Institutions in Goa for purchasing a piece of land in Goa. Since the complainant failed to keep his promise, the accused, after waiting for a year, was constrained to issue a stop payment notice. Despite the request made by the letter dated 28.3.97, the complainant presented the cheques to his Banker which were

bounced. The accused further stated that he is not liable to pay these amounts to the complainant and there was no debt due and payable to the complainant. In short the cheques were not issued for consideration.

5. The trial Court, in both the cases, after considering the entire evidence and more particularly, the cross-examination of the complainant, has held that the complainant is unreliable and the accused has successfully rebutted the presumption available U/s.139 of the Act.

6. Mr. Lotlikar, learned Senior Counsel for the complainant at the outset, invited my attention to the admitted facts such as issuance of the cheques by the accused, presentation of the cheques by the complainant in his bank, return memos of the bank, the legal notices issued by the complainant and the reply sent by the accused and submitted that the onus/presumption as contemplated U/s.138 and 139 of the Act was on the accused and he miserably failed to rebut the presumption and shift a burden on the complainant to prove that the cheques were issued for consideration and/or for the discharge of any debt or liability. He submitted that the complainant was, therefore, not required to lead any evidence. He then submitted, it is true that the complainant in his cross-examination has made lot of confusion and has also made some contradictory statements, however, that does not have

any material bearing on the issue involved in this case, inasmuch as, it is the specific case of the accused that he had no transaction of whatsoever nature with the complainant and that he never entered into an agreement of any nature with Sushila Tendulkar. The impugned judgment and order of Judicial Magistrate acquitting the accused suffers from fundamental error. The Magistrate has wrongly assumed that it is the case of the complainant that the cheque was issued in view of the agreement which the accused had entered into with Sushila Tendulkar. He then submitted that the manner in which the learned Magistrate has proceeded to assess the evidence, it is apparent that he misdirected himself in appreciating that there was a presumption drawn from Section 139 of the Act by virtue of which the consideration had to be presumed to have flown from the complainant to the accused which the accused was liable to rebut by raising a probable defence. He submitted that the learned Magistrate made no efforts so as to analyse the defence of the accused, to appreciate the evidence on record in the context of the defence raised by the accused or considered various infirmities in the matter which were pointed out to him in the course of the arguments. He invited my attention to paragraph 7 of the judgment of the trial Court and submitted that what the Magistrate has done is that he has analyzed the evidence of the complainant and having been concluded that the evidence is not satisfactory has proceeded to draw

the conclusion that the presumption U/s.139 stands rebutted and therefore the accused deserves to be acquitted. The trial Court has completely overlooked that the accused never had requisite balance in his account at any point of time for honouring the cheques in question and in view thereof, there was no question that the complainant cheated the accused into issuing the cheques and that too for the purpose of enabling him to arrange the loan for the accused from the banks and financial institutions in Goa. He submitted that, according to the accused, the cheques were issued to enable the complainant to obtain loan from the banks and financial institutions for purchasing piece of land in Goa. If that was so, there was no reason for the accused to issue the cheques in the personal name of the complainant. The accused has not probabalised his defence either by leading any evidence or even by cross-examination of the complainant. He submitted, that the defence of the accused has remained unsubstantiated. The presumption of consideration remained unrebutted and, therefore, acquittal of the accused is unsustainable. Mr. Lotlikar, in support of his submission placed reliance upon the judgment of the Apex Court in **Hiten P. Dalal Versus Batindranath Banerjee, 2001, All M R (Cri) 1497**, **MMTC Ltd. and Another Versus M/s. Medchi Chemical Pharma, (P) Ltd and Another, 2002, All M R 230, Bharat Barrel and Drum Manufacturing Company Versus Amin Chan Payrelal , AIR 1999,**

S.C. 1008 and judgment of this Court in **TaraMahommad Haji Abdul Rehman Versus Tyeb Ebrahim Bharamchari, 1948, BLR, 219.**

7. Mr.S. Chandrashekar, learned Counsel for the respondent on the other hand, at the outset submitted that the accused has successfully rebutted the statutory presumption by eliciting a very valuable admissions in the cross-examination of the complainant. From the Cross-examination it is clear that the complaint is not honest and completely unreliable and his credibility has been completely destroyed. He submitted that the complainant has not been able to frame his case and the burden was shifted to him as the accused has rebutted the statutory presumption. My attention was drawn to the extensive cross-examination of the complainant and he submitted that it is full of inconsistencies, contradictions and discrepancies which are sufficient to hold that the burden which was on the accused to prove the presumption under Section 138 and 139 of the Act, he has successfully discharged. The evidence on record clearly shows that the complainant had absolutely no source of income at the relevant time when he allegedly paid the amount of Rs.8 Lacs in cash in two instalments, to the accused. He is not sure as to whether he borrowed that amount from his aunt Sushila Tendulkar or from the friends and he paid that amount on behalf of his aunt Sushila Tendulkar as her Power of Attorney or on his own

behalf. He did make reference to an agreement between Sushila Tendulkar and the accused and the Power of Attorney executed by her in favour of the complainant. However, in both these cases, he has made contradictory statements in respect of the agreement so also, the Power of Attorney. This itself, Mr. S. Chandrashekhar, learned Counsel submitted, is sufficient to hold that the accused has successfully rebutted the presumption and has probablised the defence disclosed in his evidence. My attention was also drawn to the observation made by the learned Judge against the complainant while recording his cross-examination about his adamant attitude which according to Mr. S. Chandrashekar, compelled the learned Judge to stop his cross-examination. In support of his submissions he placed reliance upon the judgment of this Court in **Laxmikant D.N.Karmali Vs.Santosh V. Naik, reported in 2006(2) Goa L.R. 251** and the judgment of the Supreme Court in **M.S. Narayana Menon Vs State of Kerala (2006) 6 SCC 39.**

8. The Supreme Court in **Hiten P. Dalal's** case (supra) had an occasion to deal with sections 118, 138 & 139 of the Act exhaustively which have created several presumptions in favour of a complainant in a prosecution under section 138 of the Act. The Supreme Court in this case after referring to Section 138 and 139 of the

Act observed that it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on the accused. The obligation on the prosecution may be discharged with the help of presumption of law or fact unless the accused adduced evidence showing the reasonable possibility of the non-existence of the presumed fact. The Supreme Court further observed that the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonable probable, standard of reasonability being that of prudent man.

9. The Supreme Court in **M.S. Narayana Menon Versus State of Kerala, (2006) 06 SCC 39** while dealing with the definitions of 'proved' or 'disproved' to the principle behind section 118(a) of the Act has observed that even for rebutting such presumption, the evidence adduced on behalf of the complainant could be relied upon by the accused. What is needed is to raise a probable defence or that the consideration does not exist. The Supreme Court in the very same judgment after referring paragraph 22 and 23 in Hiten P Dalal's case, in paragraph No.42 has observed that “the Court, however, in the fact

situation obtaining therein (in **Hiten P. Dalal's** case) was not required to go into the question as to whether an accused can discharge the onus placed on him even from the materials brought on record by the complainant himself. Evidently, in law he is entitled to do so." The learned Single Judge of this Court in Shanaz De'Souza's case after considering the very same judgment in **Hiten P. Dalal,** has observed that although, the accused did not lead any evidence in rebuttal it does not mean that the accused could not take advantage of the cross-examination of the complainant in rebutting the presumption.

10. In **Santan Finance and Real Estate Versus Devappa, 2005(1) Goa L R 390** this Court has observed that there can no dispute with the presumption available U/s.139 of the Act in favour of the complainant. However, that presumption could not be rebutted only by way of suggestions or a statement given by the accused U/s.313 of the Cr.P.C. The presumption could be rebutted either by the accused leading evidence or bringing facts on record in cross-examination of the complainant which could make the case of the complainant improbable that the cheque was issued in discharge of any debt or other liability or through other documents produced and proved through the complainant.

11. In **Taramahommad Abdul Rehman Case** (Supra) the

Division Bench of this Court has observed that if the evidence of the complainant as well as the accused is unsatisfactory, the presumption U/s.118 of the Act, which is of the same nature as under section 139 of the Act, does not stand rebutted. It is against this backdrop, I would like to consider the evidence on record to find out whether the accused has rebutted the presumption.

12. In **Kundan Lal Rallaram Versus Custodian, Evacuee Property, Bombay, AIR 1961 SC 1316** the Supreme Court has observed that while considering the question as to whether burden of proof in terms of Section 118 had been discharged or not, relevant evidence cannot be permitted to be withheld. If a relevant evidence is withheld, the Court may draw a presumption to the effect that if the same was produced might have gone unfavourable to the complainant. Such a presumption arising under Section 118 of the Act stating ; " briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned herewith irrebuttable presumptions of law."

13. In **Kali Ram Versus Himachal Pradesh, (1973)2 SCC**

808 the Supreme Court has observed that there are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption, which would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal. Similarly in **Bharat Barrel and Drum Manufacturing Company Versus Amin Chand Payrelal, 1999(3) SCC 35** the Division Bench of the Supreme Court while considering Section 118(a) of the Act observed that "the accused can prove the non-existence of a consideration by raising a probable defence. If the accused is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the complainant who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of negotiable instrument. The burden upon the accused of proving the

non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies." It is true that in case, where the respondent failed to discharge the initial onus of proof by showing the non-existence of consideration, the complainant would invariably be held entitle to the benefit of presumption arising U/s.118(a) in his favour. The Supreme Court in **Bharat Barrel and Drum Manufacturing Company's** case has observed that "the Court may not insist upon the accused to disprove existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt." The Supreme Court, therefore, clearly opined that "it is not necessary for the accused to disprove the existence of consideration by way of direct evidence. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies."

14. Upon consideration of various judgments as noted herein above, the position of law which emerges is that it is not necessary for the accused to disprove the existence of consideration by way of direct evidence. Inference of preponderance of probabilities can be drawn not

only from the materials on record but also by reference to the circumstances upon which he relies. The accused can raise a probable defence from the material brought on record by him, so also by the complainant himself. Though it is obligatory on the Court to raise presumptions contemplated under Sections 118,138 and 139 in every case, where the factual basis for raising of the presumption has been established, what is needed for the accused is to raise a probable defence or that the consideration does not exist. The presumption could be rebutted either by leading evidence or bringing facts on record in cross-examination of the complainant which could make the case of the complainant improbable that the cheque was issued in discharge of any debt or other liability or through the documents produced and proved through the complainant.

15. If some material is brought on record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitle to acquittal. The accused can prove the non-existence of a consideration by raising a probable defence. If the accused is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus will shift to the complainant who will be obliged to prove it as a

matter of fact and upon its failure to prove will disentitle him to the grant of relief on the basis of negotiable instrument. It is true that in case, where the respondent failed to discharge the initial onus of proof by showing the non-existence of consideration, the complainant would invariably be held entitle to the benefit of presumption arising U/s.118(a) in his favour. However, the court may not insist upon the accused to disprove existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, require to be seen with doubt. The standard of proof in such cases evidently is preponderance of the probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies. The onus, contemplated U/s.118 and139 of the Act, upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused.

16. I will, therefore, have to consider whether in the case in hand, the accused probabalised his defence by any proof sufficient to rebut the presumption raised against him. The accused has mainly relied upon the cross-examination of the complainant, wherein lot of admissions were elicited, which, according to the accused, are sufficient enough to hold that the presumption contemplated U/s.139 has been

rebutted as held by the trial Court. It is against this backdrop, I now proceed to consider the evidence of the complainant to find out whether the trial Court has committed any error of law in drawing an inference on the basis of the cross-examination of the complainant that the onus was shifted on the complainant and that he failed to discharge it by establishing that the cheques were issued for consideration and/or in discharge of any debt or liability.

17. The complainant, who examined himself in both the cases, was subjected to lengthy cross-examination conducted on behalf of the accused. He has stated that he was in Tourism business and subsequently he started Real Estate Business. He was operating his business from the office located at Mahim, Mumbai under the name and style of Invitation Travels. He joined the accused in his business of Invitation Travels in 1994 as a financier. He had financed the accused for acquiring the said office premises on lease. The complainant also used to operate from the said office independently and also help the accused in his business. In the second case, when he was asked about his business he has stated that he used to run it in the name and style of Invitation Travels, thereby giving an impression that it was his business and the accused used to work with him. But later, he has admitted that the accused use to run his business in the name and style of Invitation

Travels from the said premises. He then expressed ignorance as to whether the accused was the sole proprietor of Invitation Travels. He does not remember whether there was any agreement between him and the accused in that regard. He has stated that by financing the accused for taking the said premises on lease, he obtained the right to sit in the said office. At one stage, he has also stated that he had given money to the accused to buy the premises and that till he returned the money he was allowed to buy the premises and till he returned the money he was allowed to use the said premises. He then changed his stand and stated that he had given monies to the accused for getting right to sit in the said premises and carrying on the business along with the accused. It is the very same amount for which the accused had allegedly issued the cheques in question. This amount was paid in cash. Thus, the complainant has claimed that he gave the money to the accused for obtaining a right to sit in the office premises of the accused and carry out the business with him. He has further stated that the money was given to the accused as the accused was his friend and also with an intention of carrying on the business there. He then claimed that he started Real Estate Business and he used to help the people in buying and selling the property and also that he was getting money from land transactions taking place. He also mentions about several buildings and properties at Goa and Mumbai. This claim of the

complainant is consistent with the defence propounded by the accused that he sought complainant's help for purchasing the property in Goa.

18. Complainant's evidence further show that although he is claiming that he had paid a total sum of Rs.8 Lacs, for which two cheques in question in the two appeals were given to him, he has not been able to state as to when the said sum was paid by him and whose money it was. He at times has claimed that the said sum was given to him by his aunt Sushila Tendulkar and that an agreement had been entered into between him and Sushila Tendulkar and the accused. The cheques which are the subject matter of both the appeals, according to the complainant, were the subject matter of the agreement between Sushila Tendulkar and the accused and that he was claiming amounts mentioned in the cheques on behalf of Sushila Tendulkar as her power of attorney holder. It is pertinent to note that the complaints are not filed by the complainant either on behalf of Sushila Tendulkar or as per power of attorney. The complainant has neither produced any such agreement nor the power of attorney given in his favour by Sushila Tendulkar despite repeatedly agreeing in the course of his cross-examination that he would produce the same. At various times, he has claimed that the agreement was signed by him on behalf of Sushila Tendulkar as her power of attorney holder and then he claimed that

Sushila Tendulkar herself had signed the said agreement with the accused. The complainant some times claims that he was not signatory to the agreement but had signed it as a witness. However, he has not stated as to what was the agreement pertaining to or any of the several terms of the so called agreement. The complainant, throughout his evidence, whenever was asked questions about the so called agreement and the power of attorney, contradicted his own statements and when such contradictions were pointed out to him, he sought to get around the same by repeatedly saying that he could not remember anything.

19. It appears that the accused vide letter dated 28.3.97, addressed to the complainant, had requested him to return all the 5 cheques which were given to him for raising a loan from the Bank and Financial Institutions for purchasing a piece of land in Goa. In reply to that letter, the complainant vide his letter dated 7.4.97 denied all the contentions and made reference to the said agreement between the accused and Sushila Tendulkar who had appointed him as her Power of Attorney. On this agreement and the Power of Attorney, he was extensively cross-examined. He tried to connect the issuance of cheques in question by the accused in favour of the complainant with this agreement and the Power of Attorney. However, in the cross-examination he stated that he does not remember whether there was any

such agreement between the accused and Sushila Tendulkar and that he also does not remember whether there was Power of Attorney issued in his favour in 1997. However, at one stage he has categorically stated that the amount of Rs.8 Lacs, paid to the accused in two instalments, was paid by the complainant as the Power of Attorney of Sushila Tendulkar and it was her amount. Then in further cross-examination he states that it was his money and he had raised it by taking loans and by way of charity. He has then stated that he did not know if the accused was owing any money to Sushila Tendulkar or that he had paid any monies on behalf of Sushila Tendulkar to the accused. He also states that he did not remember whether the agreement had any nexus with the cheques in question and who were the witnesses to the said agreement.

20. The complainant also was not able to disclose the source of such a large amount of Rs.8 Lacs in the case and he has at various times claimed that the money belonged to his aunt and that she had given it to the accused and then he has claimed that he had taken this amount from his friends, relatives and it was his own savings and given the same to the accused. Admittedly, the complainant was unemployed from 1985 onwards and he had no source of income. It is against this backdrop, it was incumbent upon the complainant to produce some

material on record to substantiate his claim. It is unconceivable that such a person would get such a huge sum and that to in cash, either as a loan from friends or by way of charity. The complainant has not examined either Sushila Tendulkar or his friends or relatives in support of his contention that they had given him such a huge sum in cash. If the claim of the complainant had even an iota of truth, he would surely have had some initial receipts or agreement showing the payment of money by him or by Sushila Tendulkar to the accused. When he was asked further particulars in the cross-examination, he has stated that he did not remember anything.

21. In the second case, the complainant has specifically stated that the amount of Rs.5 Lacs was given to him by Sushila Tendulkar. Sushila Tendulkar, according to this witness, had a large sum and she used to give private loans. However, he has not given details when this amount was actually paid to him and in turn when he paid that amount to the accused. He was not sure as to what were the terms and conditions for making payment of such a large sum to the accused in 1993-1994; and when the said premises was taken on lease by the accused. He could not prove the very basis for lending this amount to the accused for which the accused allegedly had issued cheques in question. The complainant has contradicted his own previous

statements. Further, although, the complainant claims that the sum of Rs.5Lacs was given to him by Sushila Tendulkar in the presence of the cousin Sadanand Thakur the complainant did not choose to examine him as a witness in support of his case. When he was asked as to when the sum of Rs.5 Lacs were paid to him by Sushila Tendulkar, he has stated, he neither remember the day on which the said amount was allegedly given to him nor the denomination of notes. The complainant states that the said sum was given to the accused and it was reduced in writing and signed by his aunt Sushila Tendulkar and the accused. However, the said agreement, as observed earlier, was not produced on record despite repeated opportunities given to the complainant. Thus, it can be seen that the complainant has proved to be lying time and again and he has been giving contradictory answers which has not only created doubt about his case but, in my opinion, is also sufficient to rebut the presumptions against the accused.

22. The complainant has not been able to frame his case. He is not clear on whose behalf the present complaints were filed. All throughout, he is inconsistent. He has changed his version from time to time. He is not sure as to when and on whose behalf the monies were paid ? how he raised the said amount ? whether Sushila Tendulkar alone paid this amount to him to pay it to the accused or his friends and

well wishers gave that amount ? and whether they gave it as loan or charity ? If what he has stated in his evidence, that he had paid the amount of Rs.8 Lacs to obtain a right to sit in the office and that he has been using it since 1993-94, is true, why should the accused pay back the said amount by two cheques. He is not sure of his own case. He does not state that he pays the rent or compensation to the accused for using the office. He has contradicted his own statements from time to time. The entire evidence of the complainant, as rightly observed by the trial Court, is not credit worthy. The complainant did not produce any account book, income tax return or any other supporting document to show that he had such a huge sum with him and that he had paid it to the accused in cash. He could not produce bank statement/s to show that he had sufficient means to pay the said sum in 1993-1994 when admittedly he was unemployed and living on charity from his friends and relatives. Time and again the accused warned by the Court to be straightforward during cross-examination and ultimately he forced the learned Judge to loose his patience and to stop the cross-examination due to his adamant attitude in the second case.

23. As against this, the accused in his evidence has stated that the cheques were given to the complainant for raising loan from the Bank or the financial institutions for purchasing a plot of land in Goa.

The complainant has stated in his evidence that he was in the Real Estate Business and he used to help the people for purchasing and selling the properties. This statement of the complainant is consistent with the defence proposed by the accused.

24. It is true, in the present case, the presumption has been raised so also established on the factual basis and, therefore, the obligation on the complainant was discharged with the help of presumption of law. But the manner in which the complainant has given his evidence, the accused, in my opinion, has rebutted the presumption by bringing the facts on record in the cross-examination of the complainant, which made the case of the complainant improbable. The complainant has failed to prove that the cheque was issued in discharge of any debt due or other liability either though the documents or oral evidence. As a matter of fact the complainant has withheld the relevant evidence, namely, the agreement and the power of attorney so also oral evidence of Sushila Tendulkar and his friends, though they were available. The complainant seems to have had withheld this evidence on record which might have gone unfavourable to him. The complainant was given repeated opportunities to produce the agreement and the power of attorney on record, but he choose not to file it. Moreover, the admissions of the complainant elicited in the course of

his cross-examination, in my opinion, are consistent with the defence propounded by the accused. As a matter of fact the admissions and contradictions in the evidence of the complainant are sufficient to hold that the accused has not only probablised his defence but proved non-existence of a consideration through the complainant's evidence.

25. The judgment of the Supreme Court in **Hiten Dalal's** case (supra) in fact situation obtained therein was not required to go into the question as to whether the accused can discharge the onus placed on him even from the materials brought on record by the complainant himself and in view thereof it was observed that the accused must adduce evidence before the court in support of the defence to make the court believe the defence to exist or consider its existence to be reasonably probable. This does not disentitle, as observed by the Supreme Court in **M.S. Narayana Menon's** case (supra), the accused in law to rebut the presumption either by leading his evidence or bringing the facts on record in the cross-examination of the complainant. In the present case the complainant even could not frame his case properly. His cross-examination coupled with the testimony of the accused is sufficient to hold that the accused has rebutted the presumption. The submission of the learned senior counsel for the complainant that the accused has not probablised his evidence either by leading evidence of

his own or the cross examination of the complainant must be rejected. The trial Court has considered the evidence of the complainant and of the accused in proper perspective and has rightly held that the accused has rebutted the presumption by bringing the facts on record in the cross examination of the complainant which made his case improbable. The findings recorded by the trial Court in any case cannot be termed as perverse nor could the complainant point out any manifest error of law in the judgment and, therefore, the appeal deserves to be dismissed. None of the judgments relied upon by the learned senior counsel for the complainant are of any avail to the complainant for seeking reversal of the order of acquittal into an order of conviction. In the result the appeals are dismissed. The judgments and orders passed in both the cases stand confirmed.

D. B. BHOSALE, J.

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